SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5491

RICHARD A. HANDVERGER, MITCHELL AXLER,
BETSY McDONALD, ROBERT W. BRETALL,
PAUL S. MARTIN, RONALD LONDON & DONALD KALISH,
Petitioners,

vs.

RICHARD A. HARVILL, DOUGLAS PAXTON, THOMAS L. HALL,
MARVIN D. JOHNSON, & ROBERT L. HOUSTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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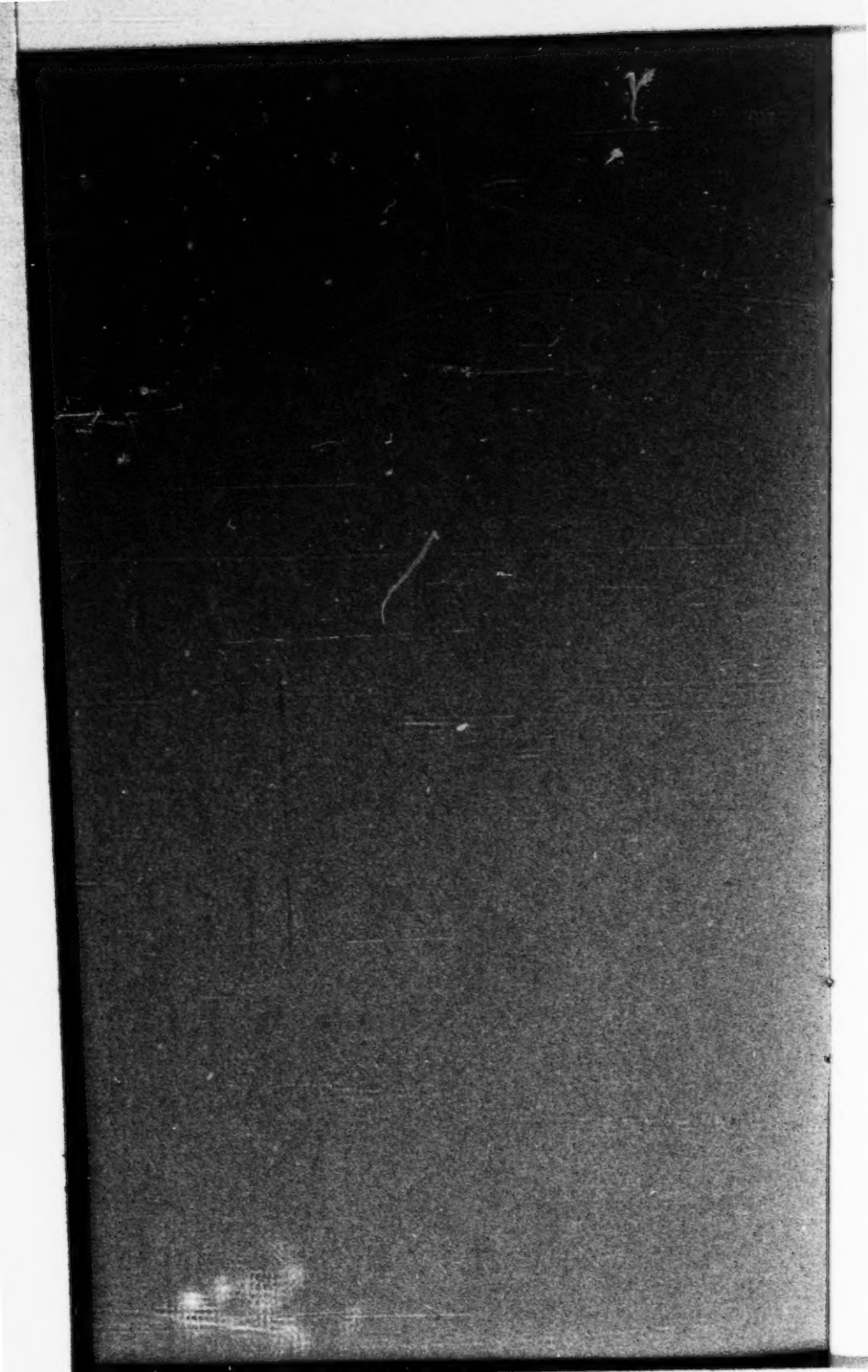

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OPINIONS BELOW

The Judgment, Findings of Fact and Conclusions of Law of the United States District Court for the District of Arizona appear verbatim in petitioners' appendix. The opinion of the Court of Appeals for the Ninth Circuit also appears in petitioners' appendix.

JURISDICTION

This court has jurisdiction to review a decision of the court of appeals by grant of a writ of certiorari under Article III of the United States Constitution and 28 U.S.C. §1254(1). The petition must be filed within ninety days of entry of judgment. *Id.* §2101 (c). See Rule 22(3), Rules of the Supreme Court of the United States. Respondents will not burden the Court with any argument as to whether or not the requirements of Rule 22(4) and 28 U.S.C. §2101(c) have been met regarding late applications.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners have claimed infringement of their rights of freedom of speech, assembly, and association as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and that they are entitled to money damages therefore under 42 U.S.C. §1983, and 28 U.S.C. §1343.

QUESTIONS PRESENTED

1. Assuming for the purpose of framing this issue that petitioners' First Amendment rights were infringed upon, does this alone entitle petitioners to money damages under 42 U.S.C. §1983 or 28 U.S.C. §1343, or is the defense of good faith on the part of the respondents in obtaining the temporary restraining order available?

2. Did the lower courts err in finding that respondents acted in good faith?

STATEMENT OF THE CASE

Petitioners' statement of the case is conclusory and misleading in many instances. In others, it adds matters not in the record and irrelevant to this case, such as the statements on page 4 of the Petition regarding matters of "common knowledge" of the atmosphere surrounding demonstrations in Tucson. Respondents suggest that the Findings of Fact of the District Court and the recitation of facts found in the Ninth Circuit opinion are accurate.

THERE IS NO SPECIAL OR IMPORTANT REASON TO GRANT A WRIT HEREIN BECAUSE EVEN IF PETITIONERS' FIRST AMENDMENT RIGHTS WERE INFRINGED UPON, THEY ARE NOT ENTITLED TO MONEY DAMAGES UNDER 28 U.S.C. §1343, or 42 U.S.C. §1983 SINCE THE RESPONDENTS ACTED IN GOOD FAITH, OBJECTIVELY VIEWED, AS FOUND BY BOTH LOWER COURTS.

Generally, where a person's constitutional rights are violated by a person acting under color of state law, 42 U.S.C. §1983, and 28 U.S.C. §1343 provide that the federal courts are a forum for granting relief for such violation. Respondent calls attention to the two basic categories of such relief: (1) injunctive, and (2) money damages. Where the infringement complained of is connected with an ongoing policy or activity, injunctive relief is appropriate, provided the infringement of a constitutional right by one acting under color of law is found. On the other hand, where the alleged violation arises out of a single occurrence, injunctive relief is superfluous and the remedy provided is damages. Where it is found by a court that ongoing activity or conduct by a person acting under color of law is illegal and an infringement on the constitutional right of a §1983 plaintiff, the defendant's claim of a "good faith" belief in the legality of his actions is, of course, no

defense to a suit for an *injunction*. On the other hand, where the infringement complained of is not of an ongoing nature, but arose out of a single incident, that the defendant acted in good faith *is* a bar to recovery of damages. This is so even though the action complained of may later be determined to have been unconstitutional. *Pierson v. Ray*, 386 U.S. 547 (1967); *Banish v. Locks*, 414 2d 638 (7th Cir. 1969). See *Sellers v. Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970). In essence, *Pierson v. Ray supra*, held that plaintiffs' constitutional rights were in fact violated by an arrest pursuant to an unconstitutional statute. The defense of a good faith belief that the conduct was legal was afforded defendants provided that the fact finding body found the existence of facts to support the defense.

The parallel here is obvious. The District Judge as the finder of facts concluded that respondents had acted in good faith and denied money damages.

In contrast, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), presents a case where the plaintiffs sought both an injunction restraining school officials from further disciplining those students, and nominal damages. Under the facts of that case, the defendants' actions were held to be in violation of the plaintiffs' rights of expression, and the case was remanded to the lower court for determination of the appropriate relief:

> "We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine." 393 U.S. at 514.

The defense of good faith would presumably have been available against the claim for nominal damages, whereas it was not available as against the prayer for injunction.

Petitioner's complaint in the case at bar is that the obtaining of the temporary restraining order was a violation of their constitutional rights of speech and assembly. In contrast with *Tinker, supra,* however, their prayer was solely for substantial money damages. Without deciding the First Amendment issues involved the Ninth Circuit held that the defense of "good faith" on the part of the respondents was available, and further that the record justified the district court's dismissal of the complaint:

> That Harvill and other university officials acted in good faith is obvious. Fearing that the "commencement" would engender violence and involve violations of federal law, they turned the matter over to appropriate counsel. Counsel confirmed their fears of likely illegal activity, and advised that a temporary restraining order would be a proper means to prohibit its occurrence. We hold that the defense of good faith is available to appellees. *Handverger v. Harvill,* ___, F.2d ___, ___ (9th Cir., 1973).

CONCLUSION

Irrespective of whether petitioners' First Amendment rights were violated, respondents demonstrated to the trial court that they acted in good faith, and this is a bar to an action for damages under §1983. The Ninth Circuit affirmed this finding. These decisions should not be disturbed unless clearly erroneous. Therefore, there appear no special or important reasons for granting the writ.

Respondents, Richard A. Harvill, *et al.*, respectfully urge that the petition for the writ of certiorari be denied.

Respectfully submitted,

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